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BEFORE THE ARIZONA CORPORATION COMMISSION

2001 MAY 17 P 4: 28

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Arizona Corporation Commission

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IN THE MATTER OF US WEST COMMUNI-
CATIONS, INC.'S COMPLIANCE WITH
§ 271 OF THE TELECOMMUNICATIONS
ACT OF 1996

Docket No. T-00000A-97-238

NOTICE OF FILING AFFIDAVIT OF DAVID M. KAUFMAN
REGARDING THE PUBLIC INTEREST STANDARD

Please take notice that e.spire Communications, Inc. submits the attached affidavit
of David M. Kaufman regarding the public interest standard.

Dated: May 17, 2001.

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BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
MARC SPITZER
COMMISSIONER

IN THE MATTER OF US WEST COMMUNI-
CATIONS, INC.'S COMPLIANCE WITH
§ 271 OF THE TELECOMMUNICATIONS
ACT OF 1996

Docket No. T-00000A-97-238

**AFFIDAVIT OF DAVID M. KAUFMAN
REGARDING THE PUBLIC INTEREST STANDARDS**

e.spire Communications, Inc. and ACSI Local Switched Services, Inc., d/b/a e.spire Communications ("e.spire"), hereby submits this Affidavit of David M. Kaufman to address whether the public interest will be served by Qwest's entry into the interLATA long distance market in the Arizona.

INTRODUCTION & QUALIFICATIONS

1. My name is David M. Kaufman. I am Director of Regulatory Affairs for e.spire. My business address is 343 West Manhattan Avenue, Santa Fe, New Mexico 87501.
2. My education and relevant work experience are as follows: I joined e.spire in June 1998, and serve as Director of Regulatory Affairs. Prior to joining e.spire, I was the General Counsel of the New Mexico State Corporation Commission and was an

1 Assistant Attorney General for the State of New Mexico from 1991 until June 1998.
2 Previously, I was in the private practice of law in California and Illinois. I am a graduate
3 of Allegheny College and received my law degree from the DePaul University School of
4 Law in 1983. I am admitted to practice law in Illinois, California, New Mexico and New
5 York.

6
7 **PURPOSE OF AFFIDAVIT**

8 3. The purpose of my affidavit is to describe e.spire's experience in
9 attempting to enter the Arizona telecommunications market and some of the difficulties
10 associated with that entry as a result of conduct on the part of Qwest and the consequences
11 suffered by e.spire and Arizona consumers as a result of that conduct. e.spire's experience
12 demonstrates that it would not be in the public interest to allow Qwest entry into the
13 interLATA market at this time.

14 4. e.spire, through its operating subsidiaries, provides a full range of
15 local and long distance telecommunications services in more than 38 markets throughout
16 the northeastern, southeastern and southwestern United States. In Arizona, e.spire
17 competes with Qwest. Prior to the enactment of the Telecommunications Act of 1996,
18 Qwest's predecessor, U S WEST Communications, Inc., held a government-sanctioned
19 monopoly on the provision of local telecommunications service throughout much, if not
20 all, of its service territory. To this day, Qwest retains *de facto* monopoly control over its
21 local exchange markets, since it retains an overwhelming market share and since
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1 competitors, like e.spire, must at least in part rely on Qwest's facilities and interconnection
2 to Qwest's network in order to provide competitive service offerings to the small portion of
3 the market that they have been able to win thus far from Qwest.

4 5. e.spire does not believe that the local telecommunications market in
5 Arizona is fully and irreversibly open to competition. A review of the financial condition
6 of the competitive industry is evidence that local markets are not open to competition.
7 Specifically in Arizona, the failures, financial distress or bankruptcies of competitive
8 carriers, and comparative robust financial health of Qwest is a clear demonstration that the
9 market is not open. For example, in the Arizona market, of the few competitive carriers
10 operating in the Tucson market (where e.spire operates), GST Telecom went out of
11 business. e.spire has been forced to file a voluntary petition for bankruptcy reorganization.
12 (However, unlike the case with GST, e.spire intends to successfully exit bankruptcy
13 quickly.) Other Arizona competitors, such as Covad, WinStar, Teligent, ICG, Northpoint,
14 Rhythms Links and 2nd Century have filed bankruptcy petitions, seen extreme decreases in
15 stock values, faced severe financial difficulties or have gone out of business. Even a
16 cursory review of the poor financial health of the competitive sector of the industry as
17 compared to the robust financial condition of the Baby Bells, such as Qwest, provides
18 compelling support for the proposition that local telecommunications markets are not truly
19 open to competition. Allowing Qwest entry into the interLATA market at this time, would
20 lessen the chance that the competitive industry will gain a foothold and expand in the
21 Arizona local telecommunications market. If a competitive local telecommunications
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1 market is not established, the pro-competitive purposes of the Telecommunications Act of
2 1996 would be frustrated and the potential benefits consumers would reap as a result of a
3 vibrant competitive local telecommunications industry would be eliminated.

4 6. Most recently, Qwest's has disrupted e.spire's business in three
5 primary areas. First, Qwest has withheld millions of dollars of reciprocal compensation
6 payments owed to e.spire. Second, Qwest has refused to convert special access circuits to
7 enhanced extended links, commonly referred to as EELs. And, third, Qwest has failed to
8 provision special access circuits ordered by e.spire in a timely manner.

9 7. Concerning reciprocal compensation, Qwest continues to refuse to
10 compensate e.spire for delivering calls made by Qwest end users to e.spire customers at
11 rates agreed to in the interconnection agreement entered into by the two companies (rates
12 that were proposed by Qwest's predecessor, US WEST) and approved by this Commission.

13 8. To date, Qwest has withheld reciprocal compensation payments due
14 e.spire amounting to more than \$10 million in the Qwest region. Some of these payments
15 have been due and owing for almost five years. Had Qwest made its payments in a timely
16 manner, the financial condition of e.spire would unquestionably be better today. (Although
17 it is no longer the case, late last year, e.spire had accounts receivable of more than \$60
18 million for reciprocal compensation alone.) Moreover, if such payments were made, the
19 regard of the financial community for companies like e.spire would also likely be
20 enhanced. The large accounts receivable on the books of many competitive carriers,
21 especially comparatively small companies like e.spire, and the time and expense required
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1 to collect those receivables through litigation have hurt the competitive industry in the eyes
2 of the investment community. Thus, it is entirely possible that had Qwest made its
3 reciprocal compensation payments to e.spire in a timely manner, e.spire would not have
4 been forced to file its bankruptcy petition and e.spire's value to investors would have been
5 considerably enhanced.

6
7 9. Moreover, in its recent Order concerning reciprocal compensation and
8 the prospective treatment of ISP-bound traffic, the Federal Communications Commission
9 ("FCC") stated that it does not believe that ISP-bound calls are subject to reciprocal
10 compensation pursuant to 47 U.S.C. § 251(b). *In the Matter of the Implementation of the*
11 *Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier*
12 *Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and
13 Report and Order at ¶ 23, FCC 01-131 (released April 27, 2001) ("*Order on Remand*").¹

14 10. Assuming arguendo that ISP-bound traffic is determined not to be
15 subject to reciprocal compensation under 47 U.S.C. § 251(b), then reciprocal compensation
16 for such traffic may not be considered as part of the section 271 competitive checklist. *See*
17 *47 U.S.C. § 271(c)(2)(B)(xiii)*. In that case, it may be appropriate for this Commission and
18 the FCC to consider issues related to reciprocal compensation for the termination of ISP-
19 bound traffic as part of the consideration of whether "the requested authorization [for
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23 ¹ However, in its ruling, the FCC stated that termination of such traffic should be
compensated at this time. *Order on Remand* at ¶ 77.

1 interLATA entry] is consistent with the public interest, convenience, and necessity.” See
2 47 U.S.C. § 271(d)(3)(C).

3 11. Concerning the EEL, Qwest has interpreted the FCC’s Order, *In the*
4 *Matter of Implementation of the Local Competition Provisions of the Telecommunications*
5 *Act of 1996*, CC Docket No. 96-98, Supplemental Order Clarification, FCC 00-183
6 (released June 2, 2000) (“*Supplemental Order Clarification*”), in a manner that acts as a
7 barrier to entry.

8 12. Qwest has rejected the vast majority of e.spire’s orders requesting the
9 conversion of special access circuits to EELs in Arizona. Qwest apparently believes that
10 the FCC statements about co-mingling allow Qwest to charge e.spire for re-grooming and
11 rolling DS-1 circuits from aggregated DS-3 circuits. e.spire believes that the Qwest
12 position is without basis. Indeed, in its statements addressing commingling, the FCC was
13 concerned about the loss of revenues from switched access traffic, not the competitive
14 offerings of CLECS. In fact, each of the DS-1 circuits for which e.spire has requested
15 conversion meet the eligibility requirements of the FCC’s *Supplemental Order*
16 *Clarification*. e.spire believes there is no lawful reason for Qwest to delay or deny the
17 requested conversions of its special access circuits to UNE-Combination pricing. Allowing
18 Qwest entry into the interLATA market while it refuses to process e.spire’s conversion
19 requests is not in the public interest.
20

21 13. Concerning provisioning issues, as a wholesale customer of Qwest,
22 e.spire purchases special access services that it then combines with other e.spire services
23

1 and facilities in providing services to e.spire's end-user customers. As a result of delays,
2 some lasting for many months, in the provisioning of those services by Qwest, e.spire has
3 suffered monetary damages and has lost reputation and customers. As with Qwest's
4 refusal to pay e.spire amounts owed for reciprocal compensation and Qwest's refusal to
5 convert e.spire's special access circuits to EELs, delays in provisioning e.spire's orders
6 have harmed e.spire's ability to enter the Arizona market and contributed to its bankruptcy
7 filing. Recently, Qwest has made progress to clear up the backlog of e.spire (and other)
8 orders. However, prior to approval of its interLATA entry, Qwest must first prove that it
9 has truly resolved its provisioning problems by demonstrating improvement over a
10 sustained period of time.

11
12 14. Finally, while there is nascent competition in the Arizona local
13 telecommunications market, it is not at all clear that the trend to competition is irreversible.
14 Until an irreversibly competitive local telecommunications market exists in this state, it is
15 premature to allow Qwest entry into the interLATA market.

16 CONCLUSION

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18 For the reasons stated above, only after: (i) the financial markets recognize that local
19 competition is worth investing in; (ii) Qwest makes full and timely payment of its
20 reciprocal compensation and other obligations; (iii) Qwest demonstrates that it meets
21 reasonable provisioning standards for a sustained period of time; and (iv) the local
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telecommunications market in Arizona is irreversibly open to competition, will it be in the public interest to allow Qwest entry into the interLATA market.

STATE OF NEW MEXICO)
) ss.
COUNTY OF SANTA FE)

I, David M. Kaufman, being first duly sworn, depose and state that I am the individual who prepared the foregoing Affidavit of David M. Kaufman Regarding the Public Interest Standard, and that the statements it contains are true and correct to the best of my knowledge and belief.

Dated: May 17, 2001

David M. Kaufman

SUBSCRIBED AND SWORN TO BEFORE ME THIS 17th DAY OF May, 2001.

Notary Public

My Commission Expires: